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NO. 85-1585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF BORGER, TEXAS; BORGER POLICE OFFICER JOHN ROBERT ALONZO; BORGER POLICE OFFICER JOHN WAYNE TURNER; BORGER POLICE OFFICER BAILEY HAL ROBERTS; AND BORGER POLICE OFFICER JOHN RAY,
Petitioners

v.

SHARON GRANDSTAFF, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES C. GRANDSTAFF, AND AS NEXT FRIEND OF RANDY GLENN GATLIN, A MINOR; KAY LaJUNE GRANDSTAFF, AS NEXT FRIEND OF JO CHERYL GRANDSTAFF, A MINOR; CHARLES ROBERT GATLIN; AND J. H. GRANDSTAFF,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To The Honorable United States Supreme Court:

SHARON GRANDSTAFF, et al. file the following Brief in Opposition to the Petition for a Writ of Certiorari filed by THE CITY OF BORGER, TEXAS, et al.:

JURISDICTION

Respondents do not contest the jurisdiction of this Court over this case.

REASONS A WRIT OF CERTIORARI SHOULD BE DENIED

A. Statement of Facts:

The opinion of the Court of Appeals contains an accurate synopsis of the facts of this case. 767 F.2d 161, 165. The statement of facts provided in the Petition for a Writ of Certiorari is inaccurate in numerous particulars. Some of the more glaring errors are as follows:

1. "The suspect fired on the officers . . ." (Pet. for Cert. at 3): Actually, there was a serious dispute throughout the trial concerning whether the suspect, Lonnie Cox, ever fired a weapon. (*See*, e.g., R. 707, 1847, 1960-1961); *see* Court of Appeals opinion, 767 F.2d at 171.

2. "One or more of the officers had seen a man exit from the truck and move in a westerly direction toward the point where shortly thereafter a second pickup truck began to proceed down the caliche road toward the line of Borger patrol cars . . ." (Pet. for Cert. at 4): This is misleading. In fact, it was overwhelmingly established at trial that the claim of some of the officers, particularly Officer Turner, to have seen Lonnie Cox exit his pickup and approach the second pickup was a pure fabrication made in a desperate attempt to justify firing at the second pickup. (*See*, e.g., R. 734-735).

3. "A single shot was fired, followed by a volley of shots from several officers, including but not limited to

the Borger police officers." (Pet. for Cert. at 5): This is false. There was no evidence whatsoever that anyone other than a Borger police officer fired a shot in the direction of James Grandstaff.

4. "The party later identified as James C. Grandstaff did not comply with the officers' instructions to get his hands up and identify himself, but instead started making movements around his waist area like he was going for a pistol." (*Id.*): This is partially misleading and partially false. There was a vigorous dispute at trial concerning whether any such warnings were given. (*See*, e.g., R. 1382). In fact, the physical evidence was almost conclusive that the attack by the Borger officers upon James Grandstaff began while he was still in his truck. Thus, at least four shots were fired at the truck from short range as it moved slowly down the road. (R. 2365, 2382-2383, 2427). James Grandstaff was shot in the back with a high-powered rifle shortly after he exited his vehicle. (R. 315, 796). The bullet traveled in an upward direction through the body *parallel* to the spine. (R. 315). Thus, James Grandstaff was probably on his hands and knees at the time he was shot. (R. 336-337). Officer Ray's contention that Jim Grandstaff was upright and making movements as if to pull a weapon at the time he was shot is simply another of the transparent lies told by the Borger officers, and condoned by the City, throughout the course of this litigation. Even one of the other Borger officers contradicted his testimony. (R. 1152).

Additional facts and references to the record will be supplied with the argument.

B. Argument:

In *Monell v. Department of Social Services,* 436 U.S. 658 (1978) this Court established that a municipal government is a "person" within the meaning of § 1983. Thus, a municipality can be sued where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that bodies' officers." *Id.* at 690. Furthermore, a municipality may be sued for constitutional deprivations "visited pursuant to governmental 'custom' even though such a custom has not received fomal approval through the bodies' official decision-making channels." *Id.* at 691.

In *Oklahoma City v. Tuttle,* ____U.S.____, 85 L.Ed.2d 791 (1985) this Court took what was described as a "small but necessary step" toward clarification of the meaning of the word "policy" in *Monell.* There, this Court held that a single incident involving a single non-policy making officer was insufficient to establish the liability of the municipality under § 1983. 85 L.Ed.2d at 804-805.

More recently, this Court has taken an aditional step toward clarifying *Monell.* In *Pembaur v. City of Cincinnati,* 54 U.S.L.W. 4289 (March 25, 1986) this Court has held that a single directive from a *policy-making* officer is sometimes sufficient to establish the liability of the municipality under § 1983. This Court went on to clarify that: "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 4292 (emphasis in original).

In the present case, the Petitioners bring forward no challenge to the instructions to the jury. Instead, they bring forward only a question concerning the sufficiency of the evidence. Thus, the true issue presented for review is whether any rational trier of fact could conclude that the tragedy involved in this case was caused by the acts of the City of Borger itself. The evidence on this issue was almost overwhelming.

The Recruitment and Training Policies of the City of Borger[1]

Police officers for the City of Borger were hired by a review board consisting of the assistant City Manager, the Chief of Police and a police lieutenant. (R. 2486). The board orally interviewed the applicants. (*Id.*) No questions were customarily asked concerning the penal code or law enforcement procedure. (R. 2486-2487). No competency tests, personality tests, or psychological examinations were administered. (R. 2487-2488). The only stated requirement to be hired as a police officer was either a high chool dipolma or one semester of college. (R. 2490). However, one of the officers involved in this incident was apparently not a high school graduate. (R. 2524). An officer was not even required to obtain

1. In *Oklahoma City v. Tuttle, supra,* at n. 7, this Court reserved the question of whether grossly negligent training of a single officer could give rise to municipal lability. This record contains evidence of grossly negligent recruiting, training, and supervision of the *entire police force*. Furthermore, the evidence regarding recruitment, training, and supervision is only the first link in the chain that leads inevitably to the conclusion that the death of Jim Grandstaff was the fault of the City of Borger. The comparative fault issue, submitted to the jury for purposes of the pendent state law claims, accurately sets forth the position of Respondents: 1% the fault of James Grandstaff; 3% the fault of each of the individual defendants; and 89% the fault of the City of Borger itself.

basic certification from the State until 12 months *after* he was hired. (R. 2490). Thus, an applicant need not have attended the police academy. (*See* Tex. Rev. Civ. Stat. Ann. art. 4413(29aa), Sec. 6). Little or no effort was made to determine the academic performance of those applicants who had attended the academy. (R. 2495). The police applicants were asked basically the same questions as the secretarial or even waste disposal applicants. (R. 2493-2494).

The City Council had no policy requiring training by the City of its officers. (R. 2510-2511). The council did not require any periodic proficiency tests, written or oral, of the officers. (R. 2511). No tests were required regarding knowledge of the penal code (R. 2266), citizens' rights (R. 2267), or arrest procedures. (R. 2511). No training was required in the use of police equipment. (*Id.*). No training was required on when it was appropriate to resort to deadly force. (R. 2512). In fact, no effort was even made to make the police officers aware of any available courses in law enforcement. (R. 2513). Full control of the police department and the entire subject of police training was totally delegated to the Chief of Police. (R. 2496-2508, 2511-2512, 2555).

The training which the Chief, in fact, provided was essentially non-existent. The officers on duty testified that they had received no training whatsoever from the City of Borger. (R. 605, 2068). Specifically, they had received no instruction on when it was proper to use deadly force. (R. 440, 1081, 2251, 2274). There was no training in the use of weapons. (R. 676, 712, 2251). There was no training whatsoever on high speed chases or when to use a weapon during such a chase. (R. 1083,

2255, 2267). There was no training on how to handle an arrest or when force could be used during an arrest. (R. 1083, 2278).

The statements made by the officers on the witness stand revealed incredible incompetence and gross disregard for human life. Officer Roberts testified it was proper to *open fire* if a person refused to get out of a vehicle in response to a police order. (R. 516). Officer Turner testified that it was perfectly proper to fire on a suspect even though no weapon could be seen. (R. 826). He stated that this was the policy of the City of Borger. (*Id.*). Officer Ray saw nothing wrong with firing at a suspect's vehicle even though it was in front of a farmhouse. (R. 991). Officer Alonzo could find nothing wrong with the use of gunfire in the presence of innocent bystanders. (R. 2270).

The officers were unanimous in their testimony that Borger's only stated policy on the use of deadly force was to "follow the penal code." (R. 440, 964, 1086, 2068). This policy was promulgated by the Chief of Police. (R. 2069). Thus, so long as their conduct fell short of criminal responsibility, the officers were in compliance with the stated policy of the City of Borger; Borger required no stiffer standard. (R. 1090-1091). Each of the officers further testified that *all* of their conduct on August 11, 1981, comported with the policies of the City of Borger. (R. 826, 963, 1081-1082, 1087, 2067; *see* R. 423, 442). There was absolutely no evidence to the contrary.

Supervision Policies of the City of Borger

The on-duty Borger police force on the morning of August 11, 1981, consisted of six officers. (R. 608).

Although some had previous law enforcement experience, they were largely untested at Borger. The most senior officer on duty had been on the force for eight months. (R. 2053). One of the remaining officers had been on the force for five months (R. 860), one for four months (R. 604), two for two months (R. 388, 1102), and one for two days (R. 676). It was the regular night off of Lieutenant Poston, who was normally in charge of the shift. (R. 1106). It was also the regular night off of Officers Lemry and Krueger, who were normally the senior officers on the shift. (R. 2053-2054). Furthermore, the City of Borger failed to take even the simple step of designating one of the six rookie officers to be in charge. Even this might have avoided the tragedy.[2]

The inevitable result of the policies of haphazard recruiting, no training, and no supervision was a time bomb waiting to explode. The bomb exploded on August 11, 1981.

Events of August 11, 1981

Petitioners, in an effort to bring this case within the bounds of *Oklahoma City v. Tuttle, supra,* choose to classify this case as involving a single "incident." *Tuttle* involved a single "incident" in the precise sense of the word. The only conduct which could be faulted was a single shot by a single officer. The present case cannot be characterized as a single "incident." Instead, there were a series of episodes on the morning in question. The conduct of the Borger officers during each of the episodes was simply outrageous:

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2. Davis said Alonzo was in charge. (R. 608, 614). Alonzo said Davis was in charge. (R. 2054). Ray and Schultz did not know who was in charge. (R. 976, 1104). Roberts really did not know who was in charge, but "guessed" that Davis was. (R. 530-531).

The Chase

The "incident" began when Officers Roberts, Turner and Davis attempted to apprehend Lonnie Cox. (R. 409, 614). Cox was supposedly wanted for grand larceny in Oklahoma, but the officers had no arrest warrant. (R. 1552-1553). The officers had also been advised that Cox might have a kidnap victim with him. (R. 1563). Cox refused to stop his vehicle and led the three officers on a chase at speeds exceeding 90 miles per hour. (R. 416-418). The three remaining Borger officers on duty joined in the chase within the next few minutes. (R. 615, 1118, 2076).[3]

At some point in the chase, Roberts helped Turner load an automatic rifle and instructed Turner to fire at Cox. (R. 421).[4] Turner did so. (R. 429). Davis directed Ray, who was directly behind Cox to also fire at the pickup. (R. 616, 899). Ray, a right-handed person, then began shooting his .357 magnum with his left hand while driving with his right hand. (R. 900). Each of the officers admitted that he was unable to tell how many people were in the truck they were pursuing. (R. 416, 728, 869). The officers believed that Cox might have a kidnap victim with him. (R. 417, 728). Furthermore, there were numerous farmhouses in the area. (R. 1581). Nevertheless, the officers did not attempt to shoot a tire; they aimed for the cab of the truck, running the risk of hitting the possible kidnap victim in the cab

3. Even if the gunfire is disregarded, the manner in which the chase was conducted itself displayed a reckless disregard for human life. For no apparent reason, Roberts chose to drive in excess of 90 miles per hour on the wrong side of a divided highway in the dark. (R. 418).

4. As noted earlier, there was a dispute at trial concerning whether Cox fired first.

or other innocent parties further down the highway. (R. 726-728). At the time, none of the officers gave any thought to the risk. (R. 442, 727-728; *see* R. 616, 903).

Thus, the Borger officers displayed reckless disregard for human life throughout the chase. There was evidence from which the jury could infer that the Chief of Police was listening to all of this on the radio. (R. 1212, 1229, 1254, 2055). He gave the officers no instructions.

Events on the Ranch Prior to the Shooting

Cox was eventually shot in the back; he drove off of the highway, crashed through a fence, and brought his truck to a stop within approximately 100 feet of the house where the Grandstaffs lived. (R. 435-436, 1716-1717; *see* PX-8A). The Borger officers continued their pursuit and, despite the farmhouse which was plainly visible directly behind the truck, again opened fire at the Cox truck. (R. 459). One of the officer's bullets actually hit the Grandstaff home. (R. 2325). The bullet penetrated the exterior wall of the living room and traveled toward the bedrooms. (R. 266). Sleeping in the bedrooms were a man, a woman, and three children. (R. 223-224). A scientific analysis of the bullet path showed that it had been fired from a distance of *at most* 75 feet. (R. 2374).[5] The total disregard for human life continued; the proximity of the scene to the farmhouse was broadcast on the radio (R. 1580); the Chief of Police *still* gave no instructions.

5. The bullet in question was of a somewhat unusual caliber .41. (R. 2325). Officer Roberts was the only one on the scene who had a weapon capable of firing that bullet. (R. 456, 1912). In yet another incredible lie by the Borger officers, Roberts denied firing the weapon in question. (R. 455).

The Shooting Itself

At some point in this rain of gunfire, Cox had managed to get out of his truck and escape. (R. 447). Cox apparently left the truck out of gear, and it rolled backwards and to the east, coming to rest near a fence some 400 to 500 feet from the house. (R. 460; PX-8A). Officers Roberts and Alonzo went to investigate the truck. (R. 488, 2105). It was apparent from the bullet-hole in the driver's seat and the blood all over the truck that Cox had been hit and was seriously wounded. (R. 494). Roberts and Alonzo had a walkie-talkie available to broadcast this fact to the other four officers, but apparently did not do so. (*See* R. 505-506).

At approximately this point, James Grandstaff left his house; he stated that he was going to help the police. (R. 230). He drove his pickup truck slowly down the road toward the police cars. (R. 231). Although it was apparent that the driver of the second pickup was probably not Lonnie Cox (R. 1221, 1223, 1603),[6] either Alonzo or Roberts or both opened fire on the second pickup as it went slowly past them in the direction of the other officers. (R. 2382-2383, 2427). James Grandstaff, who, perhaps, believed that the fugitive was firing at him, drove his truck off the road to the opposite side of the police cars from the source of the gunfire. (R. 1371, 1373). As James Grandstaff got out of his truck, Officers Ray and Turner also opened fire at him. (R. 790, 792, 1005). James Grandstaff probably crouched on the ground behind the door of his truck to avoid this gunfire. (R. 336-337, 2395). In the meantime, Officer

6. The dispatch log indicates that the following was broadcast on the radio: "Car coming out from house. Don't know if it will be people." *Still* no instructions from the Chief.

Alonzo apparently crossed to the other side of the road, crept up behind James Grandstaff, and shot him in the back from a range of 20 to 30 feet. (R. 2391-2392).

The Mythical "Warning" Shot

Deputy Morris of the Hutchison County Sheriff's Department arrived on the scene very shortly after the shooting. He testified that he heard a *single* shot as he was turning onto the road. (R. 1585). Morris did not hear the earlier volley of shots, and it seems likely that this final, isolated shot was the one that killed James Grandstaff. At trial, five of the six Borger officers offered an explanation of this shot. They testified that Officer Davis fired a "warning shot" into the ground next to James Grandstaff before the officers handcuffed him. (R. 538, 626, 800, 1042, 2211). It is highly unlikely that any such shot was fired. The statements given by Turner, Ray and Alonzo immediately after the shooting do not mention such a shot. (R. 801, 1042, 2212). Alonzo's deposition does not mention any such shot. (R. 2215). One of the Borger officers, Schultz, denied at trial that any such shot was fired. (R. 1160). Deputy Hart of the Carson County Sheriff's Department who had also arrived on the scene by this time denied that any such shot was fired. (R. 1395). A later search of the area with a metal detector did not reveal a buried slug. (R. 2347). The jury was free to interpret the motives of the five officers who intentionally invented this gruesome story of firing a "warning" shot into the ground next to a man who was flat on his face bleeding to death.

The Immediate Aftermath of the Shooting

When the gunfire had ceased, all of the Borger officers approached the Grandstaff truck. (R. 526, 624, 797,

1033, 1148, 1388, 1600). They found a man lying on his stomach with a bullet wound in his back groaning in obvious pain. (R. 532, 624, 1047). One of the officers testified that James Grandstaff immediately informed them that they had shot the wrong man. (R. 804). Nevertheless, Officer Roberts, who weighed 330 pounds, sat on top of the man and handcuffed his hands behind him. (R. 1039). The officers then dragged him up to the front of his truck. (R. 547).

James Grandstaff was left there with his hands cuffed behind him and his face in the dirt. (R. 557). He tried to get up on several occasions and stated that he wanted to go home. (R. 570, 627, 2235-2236). A law enforcement officer from another jurisdiction who arrived on the scene perhaps five minutes after the shooting testified that he twice saw Borger Officer Davis place his foot on the side of James Grandstaff's face and shove it back into the dirt. (R. 1516-1519). None of the other Borger officers took any steps to prevent this. Eventually, all of the Borger officers admittedly knew that they had shot the wrong man. (R. 564-565, 627, 1058-1059, 1401, 2234). Nevertheless, James Grandstaff remained handcuffed until he bled to death. (R. 311-312).

The Surrender of Cox

Later that morning, Lonnie Cox voluntarily surrendered. (R. 582). He was unarmed and seriously wounded. (R. 583). There was evidence in the record showing that he was also mistreated by the Borger police after he surrendered. (R. 584-585; PX-100).

The Cover-Up

As the trial progressed, it became increasingly obvious that, before the scene was investigated, someone tampered

with the evidence in an effort to corroborate the stories told by the Borger officers and justify their conduct:

1. The bullet hulls near where the Cox truck first came to a stop: The scene investigator found 15 spent rifle cartridges in the pasture to the east of the road and approximately 778 feet from the highway. (R. 1710-1711). Skid marks (which, presumably, marked the point where Cox stopped the truck for the first time) were found in the grass about a car length west of the cartridge cases. (R. 1716-1717). Superficially, these cartridges seem to substantiate the contention of the Borger officers that Cox had fired at them after he exited from his truck. (*See, e.g.,* R. 447). A ballistics expert verified that 14 of these 15 cartridges had, indeed, been fired from the weapon originally possessed by Cox, but later confiscated by Alonzo. (R. 2318). However, one of the 15 cartridges had been fired from a weapon owned by Officer *Roberts* which had never been in the possession of Lonnie Cox. (*Id*).[7] There were other considerations which make it self-evident that the 15 cartridges in question were "supplied" to the scene. The officers uniformly testified that Cox ran to the west when he exited his truck. (R. 451-

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7. Ranger Gillespie made the following confused comments at trial about the latter cartridge:

> Now whether they was mixed up in packaging. I have wondered how that got up there. But at a scene like that, when you have got people wandering around, somebody's liable to pick something up, wander around, look down, whoops, I've got that in my hand. I'm going to throw it down.
>
> There is no way . . . I don't understand what that was doing up there.

(R. 2024).

454, 620, 737, 940). The spent cartridges were found a car length east of the skid marks. (R. 1716-1717). Thus, the officers' testimony required that the spent cartridges from the weapon in question eject 15 or 20 feet to the right with the truck in the way. The weapon in question does not eject that far. (R. 2385). Furthermore, the truck was found completely enclosed with the weapon *inside*. (R. 502). Thus, in order to substantiate the officers' story, Cox would had to have exited the truck, fired his weapon 15 times, thrown the weapon back into the cab of the truck, and shut the door, all before the truck rolled back down the hill. These considerations, together with the cartridge from the wrong weapon, make it certain that the fifteen spent cartridges were planted.

2. The spent cartridges in the truck. Two spent cartridges from the same weapon were found inside the Cox truck. (R. 2319-2320). Superficially, these cartridges substantiated the officers' testimony that Cox fired at them from the truck during the chase. However, Cox would have had to hold his rifle upside down to have fired from his window and left those cartridges. (R. 1960). The hot cartridges would have come back in his face. (R. 1961). These two cartridges were also "supplied" to the scene.

3. The dispatch tape: This would have documented exactly what was said over the radio during the events in question and proved or disproved the exact extent to which the Chief of Police was himself a participant. The recorder allegedly malfunctioned that night. (R. 1187). The tape record-

ing in question mysteriously disappeared. (R. 1195).

There was evidence at trial which strongly suggested that the person who manipulated the evidence was the Chief of Police himself. (R. 2248). The City rested without presenting any defense and did not call the Chief as a witness.

The Reaction of the City of Borger

It was obvious on August 12, 1981, that a man was dead without justification, that a Borger officer had shot him, and that the statements given by the Borger officers could not be reconciled with the autopsy or other physical evidence. Nevertheless, none of the officers involved in the incident was ever reprimanded or punished in any way. (R. 832). The Chief of Police did not even criticize their conduct. (R. 1079, 2260). Indeed, each of the officers involved received a raise shortly after the incident. (R. 2500).

Analysis

Petitioners rely primarily on *Oklahoma City v. Tuttle, supra.* The only similarity between the present case and *Tuttle* is that the police killed someone. The dissimilarities between the two cases can be readily listed:

1. *Tuttle* involved a single police officer. The fact that a single officer acted in a certain manner is certainly insufficient to support any inference that the policymakers condoned, approved, or encouraged his conduct. If several officers on a large police force behave in an unreasonable manner, the question of whether the trier of fact can thereby infer

that the policymakers approved of the conduct becomes closer. This Court has recently granted review in a case presenting that issue. *Kibbe v. City of Springfield*, 777 F.2d 801 (1st Cir. 1985), *cert. granted*, 54 U.S.L.W. 3594 (March 10, 1986). The present case is at the far end of the same spectrum. When *all* of the officers who are on duty behave in the same outrageous manner, the inference that the policymakers condoned, approved, or encouraged that type of conduct becomes almost compelling.

2. *Tuttle* involved a single incident in the precise sense of the word. The only conduct of which complaint could be made was a single gunshot. A single shot can be fired in a moment of panic or a moment of anger. A single shot does not begin to support any inference that a policymaker condoned, approved, or encouraged it. Once again, the *Kibbe* case falls in the middle of the spectrum. There, the record shows five to ten shots by at least three different officers that a reasonably competent police officer would not have fired. Possibly, this supports an inference that the policymakers approved. Again, this case lies at the far end of the spectrum. This record shows an uncounted number of shots fired in a manner which displayed a total disregard for the lives of innocent bystanders. There were the numerous shots fired from speeding police vehicles in a populated area during the chase. There were numerous shots fired in the direction of a farmhouse at the scene. Finally, there was the rain of gunfire that killed James Grandstaff. The officer in *Tuttle* and the officers in *Kibbe* fired with pistols.

Some of the present officers fired pistols, but three fired high-powered automatic rifles, virtual machine guns. These weapons were not fired into the ground; they were capable of killing unknown people miles away. Furthermore, the outrageous behavior in this case was not limited to gunfire. There can be no justification for the manner in which James Grandstaff was treated after he was shot. Officer Davis' conduct of twice putting his foot in the face of a dying man and shoving it back into the dirt can only be described as sadistic. None of the other officers intervened. In short, this record reveals infinitely more than the sudden act of panic or anger revealed by the record in *Tuttle*. Thus, there is a much stronger inference that the policymakers approved of such conduct.

3. In *Tuttle* there was absolutely no evidence that any policymaker was aware of the tragedy as it occurred. In the present case, the record strongly suggests that one of the policymakers, Chief of Police Arthur Waite, was aware of the gunfire along the highway and was aware that his officers were firing weapons in the vicinity of a farmhouse. Nevertheless, he did not call off the chase or give any instructions whatsoever to the officers. This Court has recently decided in *Pembaur v. City of Cincinnati, supra*, that a single order from a policymaker can constitute policy. Likewise, when a policymaker perceives an outrage developing and fails to take steps to prevent it, this is additional strong evidence to support a finding of municipal liability.

4. The *Tuttle* case involved no evidence that the policymakers had condoned the conduct of the

officer after the fact. Indeed, such evidence would have been of little relevance because the jury found the officer to have acted in good faith and exonerated him. Here, the officers committed an absolute outrage and proceeded to give statements concerning their conduct which could be exposed as baldfaced lies by even a cursory examination of the physical evidence. Not a single officer was terminated, suspended, or even reprimanded. The Chief of Police did not even criticize their conduct. Every officer involved was given a raise less than two months after the outrage. Worse still, one of the policymakers apparently attempted to manipulate the evidence to justify the conduct of the officers. The fact that the policymakers reacted in this manner in the face of a series of incidents of the magnitude revealed in this record strongly supports the inference that this was and had always been their policy.

5. There was no testimony in *Tuttle* from the officer involved concerning his understanding of the city policies. In the present case, each of the officers involved testified that *all* of their conduct on the morning in question was in accordance with city policy. The City of Borger called no witnesses to dispute this testimony. Non-policymaking employees cannot make policy, but surely they are competent to testify what the policy is.

6. Finally, in *Tuttle* this Court expressly reserved ruling on the question of whether grossly negligent training of a single officer was a sufficient basis for municipal liability. The *Kibbe* case involves a question of gross negligence in training the

police, and this Court will, perhaps, resolve the issue there. The present record contains evidence revealing grossly negligent recruiting, training, and supervision of the entire police force. This case does not present the question of whether such evidence could *alone* support municipal liability. Petitioners have not preserved or brought forward such a contention. Nevertheless, this evidence certainly adds further weight to the inference that the policymakers approved and encouraged outrageous behavior by the police.

Conclusions

This case does not present a close question. The evidence that the City of Borger itself was at fault is overwhelming. Furthermore, the facts and circumstances of this case are so unique that a review by this Court is unlikely to set any meaningful precedent. The record fully justifies the statements of Judge Reavley for the Court of Appeals:

> Our reading of this long trial record reveals how officers and a city police force failed, at great cost, and how those officers and their supervisors thereafter denied their failures and concerned themselves only with unworthy, if not despicable, means to avoid liability. The City and officers insist, to this day, that they are free of fault and deserve no blame. They display no sense of obligation other than to this joint disclaimer and defense. There is not a single word in this record about any effort at any time by the City of Borger to avoid police failure or abuse. The officers, called to the witness stand by the plaintiffs, were evasive and forgetful and self-contradictory. The scene at the 6666 Ranch that

> dark night in 1981 was distressing; succeeding events, the scene of this trial, and the posture of the defense only exacerbate the distress.

767 F.2d at 166. Likewise, a review by this Court would serve no useful purpose; it would only serve to extend the tragedy. The Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari has been served by _____ to _____ on this _____ day of April, 1986.

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